

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT PERRY and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 98-864; Submitted on the Record;
Issued November 17, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of compensation in the amount of \$4,971.79 occurred; and (2) whether appellant was at fault in the creation of the overpayment.

The Board has duly reviewed the case on appeal and finds that the Office properly determined that an overpayment of compensation occurred.

Appellant filed a claim alleging on June 22, 1990 he injured his right ankle in the performance of duty. The Office accepted appellant's claim for strain-ankle with arthrotomy on March 13, 1991. The Office granted appellant a schedule award for 12 percent permanent impairment of his right lower extremity on March 30, 1992. Appellant filed an additional claim on April 5, 1993 which the Office accepted for arthralgia right ankle on January 23, 1995. The Office found on September 28, 1995 that appellant had no loss of wage-earning capacity and was not entitled to further compensation benefits.

Appellant requested an additional schedule award on September 12, 1995. In a letter dated November 28, 1995, the Office informed appellant that he had already received a schedule award for 12 percent permanent impairment of his right lower extremity and that after development the medical evidence indicated that he currently only had 11 percent impairment of that scheduled member. The Office stated that appellant did not have additional entitlement to a schedule award.¹ The Office issued two checks dated December 1, 1995, in the amount of \$2,862.65 and December 9, 1995, in the amount of \$2,109.32. The Office issued a preliminary determination of overpayment on September 4, 1996. By decision dated November 2, 1997, the Office found an overpayment in the amount of \$4,971.97 and found that appellant was not without fault in the creation of the overpayment.

¹ The Office has not issued a final decision on the issue of appellant's additional permanent impairment.

The Board finds that the Office properly determined that appellant accepted an overpayment of compensation in two checks dated December 1 and 9, 1995 as he had previously received a schedule award for 12 percent permanent impairment of his right lower extremity and was not entitled to a second award for the same impairment.²

The Board further finds appellant was at fault in the creation of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act³ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁴ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations⁵ provides in relevant part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.⁶

² In the preliminary determination of overpayment dated September 4, 1996, the Office noted that appellant currently had permanent impairment of 14 percent of the right lower extremity and had previously received a schedule award for 12 percent. As there is no final decision in the record regarding appellant's permanent impairment, the Board may not address this issue on appeal. 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193, 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.320(b).

⁶ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

In this case, the Office notified appellant by letter dated November 28, 1995 that he was not entitled to an additional schedule award as his impairment rating had not increased. This letter predated both the December 1 and 9, 1995 compensation checks.⁷ This letter provided appellant with notice at the time he received the compensation checks that he was not entitled to additional compensation for a scheduled member. Based on this letter from the Office, appellant knew or should have known that he was not entitled to December 1 and 9, 1995 checks. Therefore, appellant was not without fault in the creation of the overpayment and no waiver of collection of the overpayment is possible under section 8129(b) of the Act.

The November 21, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
November 17, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Office also notified appellant on December 12, 1995 that it had inadvertently sent two checks to which appellant was not entitled. The Office identified the December 1 and 9, 1995 checks and requested that appellant return the checks or refund the amount. However, this letter was issued after the checks and did not put appellant on notice at the time he accepted the checks that there was an overpayment.